There was no doubt that the appellant was found in possession of these goods and under Section 115 of the Customs Ordinance the question arose whether duty had been paid on these goods. The burden of proving that duty had been paid was upon the appellant. There were before the Court a receipt for the purchase of 200 dozen of these goods and compounding notices in respect of 58 dozen imported by P.W. 4 and sold to the appellant, 44 dozen imported by P.W. 5 and sold to the appellant, and 48 dozen imported by the appellant himself. There was evidence, however, that in respect of one of these lots imported that when the 44 dozen were imported all the packages in that lot were chopped by the Customs. None of the packages found in the appellant's room were so chopped. Nevertheless, ignoring these 44 dozen the appellant accounted for possession by him of 306 dozen of these powders and he was charged with possession of 180 dozen.

The learned President was not satisfied that the 180 dozen packages found were those which had been originally bought or compounded for partly because the first purchase was in January, 1954 whereas the offence was committed at the end of October, partly because none of the packages found bore the Customs' chop, and partly because of the evidence of P.W. 3, to which I shall presently refer. In my opinion the explanation given by the appellant in the circumstances was amply sufficient to raise a reasonable doubt as to whether or not these goods were uncustomed goods to the knowledge of the appellant and I think the learned President ought to have accepted this explanation.

I might not, however, have thought this a sufficient ground by itself for setting aside the conviction because the question of the credibility of an explanation is a matter of fact and the learned President had the advantage of seeing the appellant in the witness box.

There is, however, a more serious point to be considered in regard to the evidence of Pin bin Mat, P.W. 3. This witness stated that he had been arrested for carrying some goods of the appellant which were Headache Powders similar to those found in the appellant's room. He stated that the appellant gave him the goods at 9.30 p.m. when he was going off duty and that he asked him to take the goods to a rubber godown and wait for him. It appears that he was arrested before he could reach this rendezvous. The packages which this witness was carrying were produced as Ex. P. 6. They were not the subject matter of the charge against the appellant. The learned President came to the conclusion that this witness was an accomplice, but he states in his grounds of decision that having seen him and heard him he considered it would be safe to convict on his uncorroborated testimony.

Whilst there is some conflict of judicial authority as to the extent to which it is necessary for Magistrates to give reasons for believing or disbelieving witnesses I am of opinion that in the case of an accomplice a Magistrate should give definite reasons for believing an accomplice without corroboration. I am further of the opinion that the fact that the witness was carrying Headache Powders and that similar Headache Powders were found in the appellant's possession was not corroboration because it is obvious from the evidence that these Headache Powders are a fairly common commodity.

In my opinion, however, Pin bin Mat was not an accomplice at all in respect of the offence charged against the appellant, and I find it very difficult to see upon what grounds his evidence was admitted or admissible. This was clearly evidence tending to suggest that the accused had committed a similar offence on a different occasion and such evidence is never admissible in order to show that an accused person is likely to have committed the offence charged. I am unable to see that the evidence of this witness comes under any of the four categories laid down in the case of *R. V. Raju & Ors. v. R.*[1] as justifying the admission of this kind of evidence and the learned Deputy Public Prosecutor conceded that the evidence of this witness really amounted to the information upon which the Customs authorities had acted in raiding the appellant's premises.

In view of the fact that the learned President attached great weight to the evidence of this witness and also in view of the explanation given by the appellant I held that the conviction could not stand. The appeal was, therefore, allowed and the conviction quashed. I also quashed the order confiscating the exhibits and made an order for the return of the goods Ex. P. 1 to the appellant and the return of the documents Ex. P. 4A, B and C and D. 5.

Appeal allowed.

Solicitor for the appellant: *Lim Kheng Kooi.*

R. MUTHU THAMBI v. K. JANAGI

[A. C. J. (Spenser Wilkinson J.) February 18, 1955]

[Penang — Civil Appeal No. 4 of 1954]

Husband and wife — Maintenance — Married Women and Children (Maintenance) Ordinance, 1950 — Presumption of death of previous husband — Evidence Ordinance, 1950, s. 108 — Presumption by Court.

The respondent had in 1929 married a man who after two years absconded to India. In 1940 respondent went through a ceremony of marriage with appellant. The learned Magistrate found as a fact that a marriage did take place between the parties and that consequently the respondent was the appellant's wife, and he thereupon made an order for maintenance of $80 p.m. to be paid to the respondent. This was an appeal against the order made by learned Magistrate.

Held: (1) from the mere fact that a ceremony of marriage was gone through it did not necessary follow that respondent was appellant's wife; (2) unless it was proved either that the first marriage had been legally dissolved or that the first husband was dead at the time when she purported to marry the appellant, *prima facie*, the respondent was not appellant's wife; (3) the onus of proving death must rest with person to whose case that fact is essential. If the circumstances of a man's disappearance are such that it is unlikely that his relatives would have heard from him in any event then the Court will not presume his death; (4) as respondent failed to prove that she was the wife of the appellant the appeal is allowed and order of learned Magistrate set aside.

Cases referred to:—

(1) *Ivett v. Ivett* 43 L.T. 680 at p. 682.
(2) *Lal Chand Marwari v. Mahant Ramrup Gir* 42 T.L.R. 159.
(3) *In re Phene's Trusts* L.R. 5 Ch. D. 139.
(4) *Watson v. England* 60 E.R. 266.
(5) *Bowden v. Henderson* 65 E.R. 437.
(6) *Stewart v. Stewart* (1952) M.L.J. 211.

MAGISTRATE'S CIVIL APPEAL.

S. K. Das (*Sonni Pillai* with him) for the appellant.

Khoo Eng Cheang for the respondent.

Spenser Wilkinson J.: — At the conclusion of the hearing I intimated that this appeal would be allowed and that I would give the reasons for my decision in writing, which I now proceed to do.

The appeal was by a man alleged to be the husband against an order made by the Magistrate's Court ordering him to pay a sum of $80 per month for the maintenance of an applicant who claimed to be his wife.

One of the points argued before me was that the learned Magistrate had no jurisdiction to decide "the validity of the dissolution of the respondent's previous marriage" by reason of the provisions of paragraph (k) of Section 69 of the Courts Ordinance, which reads as follows:—

"69. Sessions Courts shall have no jurisdiction in actions, suits or proceedings of a civil nature — (k) except as specifically provided in any written Law for the time being in force, wherein the validity or dissolution of any marriage is in question."

I do not think there is any substance in this point. I am of opinion that maintenance proceedings come within the expression "except as specifically provided in any written law for the time being in force." Jurisdiction is given to a Magistrate's Court by the Married Women and Children (Maintenance) Ordinance, 1950 to make an order upon any person who refuses to maintain his wife to make a monthly allowance for the maintenance of his wife. In my opinion it is necessary in such proceedings by a person alleging herself to be a wife to prove in the first instance that she is the wife of the person from whom she claims maintenance (see *Ivett v. Ivett*[1]).

The undisputed facts were that in 1929 the wife married a man whose photograph she identified in Court; she lived with this man for two years, after which he was imprisoned for one month for misappropriation of money; and after coming out of prison the wife's father gave him some money with which he absconded to India. The wife has not heard from him since.

Then it is alleged that in 1940 the respondent went through a ceremony of marriage with the appellant in Bagan Serai. This is disputed by the appellant, but the learned Magistrate found as a fact that the ceremony of marriage took place, and I see no reason to interfere with his finding on this point.

In paragraph 7 of his grounds of judgment the learned Magistrate says:—

"The Court is satisfied also that a marriage did take place between the complainant and the respondent in 1940; and consequently that the complainant is the respondent's wife."

It appears to me that the learned Magistrate has here become confused between a ceremony of marriage and a valid marriage. From the mere fact that a ceremony of marriage was gone through it does not necessarily follow that the respondent is the appellant's wife. Once it appeared, as it did in this case, that the respondent had been legally married to some other man, then, unless it could be proved either that the first marriage had been legally dissolved or that the first husband was dead at the time when she purported to marry the appellant, *prima facie* the respondent was not the appellant's wife.

It was contended on behalf of the respondent that because the first husband had not been heard of by the wife for a period of over seven years that he must be presumed after the expiration of the period of seven years to be dead. I cannot accept this contention.

In the first place although where a person has not been heard of for a term of not less than seven years, there may be a presumption that he is dead, the onus of proving the death of that person at any particular date must rest with the person to whose case that fact is essential. This proposition was laid down by the

Privy Council in the case of *Lal Chand Marwari v. Mahant Ramrup Gir*[2]. In the course of the judgment in that case Lord Blanesburgh said :—

"But the law really is that on the facts now assumed there is no presumption as to Bhawan Gir being dead either in 1902 or 1904. There is only one presumption, and that is that when these suits were instituted in 1916 Bhawan Gir was no longer alive. There is no presumption at all as to when he died. That, like any other fact is a matter of proof. And their Lordships would here observe that it strikes them as not a little remarkable that the theory on this point, on which the plaintiff's pleader hazards his whole case, is still so widely held, although it has so often been shown to be mistaken .... Now upon this question there is, their Lordships are satisfied, no difference between the law of India as declared in the Evidence Act and the law of England and, searching for an explanation of this very persistent heresy, their Lordships find it in the words in which the rule both in India and in England is usually expressed."

His Lordship then quoted a passage from *In re Phene's Trusts*[3] and later said :—

"Probably the true rule would be less liable to be missed and would itself be stated more accurately, if instead of speaking of a person who had not been heard of for seven years, it described the period of disappearance as one 'of not less than seven years' ".

From this authority I think it is clear that no presumption arose as to when the first husband died but there might have been a presumption that at the date when these maintenance proceedings were commenced the husband was no longer alive, if it had been proved that he had not been heard of by those people who were likely to have heard from him had he been alive. Even this presumption, however, does not necessarily arise from the mere fact that the respondent had not heard from her former husband. There is no doubt that in the circumstances laid down in Section 108 of the Evidence Ordinance the Court may presume death but it does not follow that in every case it will do so. If the circumstances of a man's disappearance are such that it is unlikely that his relatives would have heard from him in any event then the Court will not presume his death (see *Watson v. England*[4], *Bowden v. Henderson*[5]). It appears to me that in circumstances in which the respondent's first husband left this country it is unlikely that he would have communicated either with his wife or her father. To paraphrase the judgment of the Vice Chancellor in *Watson v. England*[4] it is reasonable to presume that all along he has been concealing himself and that he never intended to return home. The mere fact of his not having been heard of since affords no inference of his death; for in the circumstances of the case it is very probable that he would never be heard of again by his relatives.

A suggestion was made in argument that some Hindu law or custom existed whereby a Hindu woman, whose husband had been absent from home for a period of years was at liberty to remarry. No evidence of any such law or custom was given by any witness competent to depose thereto. There was no evidence of the domicile of the respondent or of her first husband and, whether the custom relied upon was an Indian custom peculiar to Hindus in India or a local custom which the Courts would recognise or a matter of Hindu law, this would have to be properly proved by evidence, which was not done.

There are certain other points in the grounds of decision of the learned Magistrate upon which I think I ought to comment. In paragraph 6 of his grounds of judgment it is stated that the Court was satisfied that charges under the Married Women and Children (Maintenance) Ordinance, 1950 come under the category of criminal and not civil causes. This is clearly wrong. In the first place an application by a wife for maintenance is not a charge; and secondly, it was held in the case of *Stewart v. Stewart*[6] that such an application is a civil proceeding, and that an appeal therefrom is a civil appeal.

In paragraph 10 of his grounds of judgment the learned Magistrate makes reference to Section 494 of the Penal Code (which provides the punishment for bigamy) and to the exception thereto which makes it a defence for a wife to prove that at the time of the second marriage the husband had been continually absent from her for a space of seven years and had not been heard of by her as being alive within that time, provided she informs the person with whom a marriage is contracted of the real state of facts. I would point out, however, that the question of bigamy is quite irrelevant to the question of the validity of the marriage and the fact that the respondent might in this case have a complete defence to a charge of bigamy does not in any way validate the second marriage ceremony.

Whilst my sympathies in this case are entirely with the respondent, in my opinion, upon the facts adduced, she failed to prove that she was the wife of the appellant and therefore the learned Magistrate was wrong in making an order for maintenance in her favour.

I therefore allowed the appeal and set aside the learned Magistrate's order.

Solicitors : *Pillai, Lim, Lee & Hwang; Pillai & Eng Cheang.*

TEO SIEW JIN v. REGINA

[A. Cr. J. (Murray-Aynsley C.J.) February 23, 1955]

[Singapore — Magistrate's Appeal No. 255 of 1955]

Exchange Control Ordinance, 1953, s. 8, 5th Schedule Part II, para 1(2) & (4) — Placing to the credit of — Whether constitutes "payment".